NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Trump Plaza Associates d/b/a Trump Plaza Hotel and Casino and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO. Case 4-CA-36217

December 13, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 1, 2008, the General Counsel issued the complaint on July 10, 2008, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 4–RC–21263. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.¹

On August 4, 2008, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support of Motion. On August 5, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On August 29, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB No. 146 (2008).² Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Co-

lumbia Circuit, and the General Counsel filed a cross-application for enforcement.

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

On September 29, 2010, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 4–CA–36217 and 4–RC–21263, which is reported at 355 NLRB No. 202. Thereafter, the Acting General Counsel filed an amended complaint in Case 4–CA–36217, the Respondent filed an amended answer, the Acting General Counsel filed a supplemental memorandum in support of his Motion for Summary Judgment, and the Respondent filed a response to the Notice to Show Cause.³

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its amended answer and response, the Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

¹ The Respondent's answers deny knowledge or information sufficient to form a belief concerning the filing and service of the charge, but admit that it received a copy of the charge on or about July 2, 2008. Accordingly, we find that the Respondent's denials in this regard do not raise any issue of fact warranting a hearing.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

³ The amended complaint substitutes "September 29, 2010" for "May 30, 2008" in complaint par. 4(c) as the date on which the Union was certified as the exclusive collective-bargaining representative of the unit employees. In its amended answer and in its response to the Notice to Show Cause and brief in opposition to counsel for General Counsel's Motion for Summary Judgment, the Respondent reiterates its position, raised in its answer to the original complaint, that the Union was not properly certified by the Board. The Respondent does not dispute that the certification was issued on September 29, 2010.

⁴ Thus, we deny the Respondent's request that the Board's September 29, 2010 Decision and Certification of Representative be vacated.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the operation of a casino at Mississippi Avenue and the Boardwalk in Atlantic City, New Jersey (the Casino). During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, received gross revenues in excess of \$500,000 and purchased and received at the Casino goods valued in excess of \$5000 directly from points outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on March 31, 2007, the Union was certified on September 29, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time dealers employed by Respondent at its Mississippi and the Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collectivebargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated June 5, 2008, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. By letter dated June 25, 2008, the Respondent notified the Union that it would not bargain with it. On about October 1, 2010, by letter, the Union again requested that the Respondent recognize it and collectively bargain. The Respondent did not respond to the Union's request.

The Respondent has failed and refused to recognize and bargain with the Union as the exclusive collectivebargaining representative of the unit.⁵ We find that the Respondent's refusal to bargain with the Union constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.⁶

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Trump Plaza Associates d/b/a Trump Plaza Hotel and Casino, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to recognize and bargain with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, as the

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a badfaith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

⁵ The amended complaint alleges, and the Respondent's amended answer admits, that the Respondent has refused to bargain with the Union since June 25, 2008.

 $^{^{\}rm 6}$ In Howard Plating Industries, 230 NLRB 178, 179 (1977), the Board stated:

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exclusive collective-bargaining representative of the employees in the bargaining unit.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time dealers employed by Respondent at its Mississippi and the Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

- (b) Within 14 days after service by the Region, post at its facility in Atlantic City, New Jersey, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 2008.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 13, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL—CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time dealers employed by us at our Mississippi and the Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

TRUMP PLAZA ASSOCIATES D/B/A TRUMP PLAZA HOTEL AND CASINO